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Attorneys for Defendants Pite Duncan, LLP and Cal-Western Reconveyance Corporation

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON PORTLAND

DOUGLAS E. HALL AND KENNETH D. HALL,

Case no.: 3:10-CV-1286-BR

Plaintiffs,

DEFENDANTS PITE DUNCAN, LLP'S AND CAL-WESTERN RECONVEYANCE CORP'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS (FRCP

v.

12(b)(5))

NATIONAL CITY MORTGAGE CO., dba COMMONWEALTH UNITED MORTGAGE CO.; CAL-WESTERN RECONVEYANCE CORPORATION, as Trustee, a subsidiary of Prommis Solutions, LLC; and PITE DUNCAN, LLP,

Defendants.

INTRODUCTION

Plaintiffs have failed to state a claim against either Pite Duncan or Cal-Western upon which relief can be granted. Defendants understand that NCM is seeking a motion to make more definite

and certain the claims against it. Defendants will join that motion. Defendants reserve their right to bring a motion to dismiss for failure to state a claim against them under FRCP 12(b)(6). FRCP 12(h)(1) allows such a defense to be raised in any pleading or at trial.

Motion to Dismiss for Insufficient Service of Summons FRCP 12(b)(5).

Pursuant to FRCP 12(b)5, a motion to dismiss should be granted where there is insufficient service of process. FRCP 4(h) sets forth the requirements for serving a partnership and a corporation. Under that rule, a partnership or corporation must be served by delivering a copy of the summons and of the complaint to an officer, managing or general agent, or any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute and the statute so requires, by also mailing a copy of each to the defendant, or by following state law for serving summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made.

ORCP 7D(3) provides that the primary service method on limited partnerships and corporations shall be by personal service unless a registered agent or a general partner or a limited partnership, or officer or director cannot be found in the county where the action is filed. If that is the case, then service by mail must be sent to the office of the registered agent or to the last registered office of the limited partnership, as shown by the records on file in the office of the Secretary of State and in accordance with the rules set forth in ORCP 7D(2)(d)(i), which provide "service by mail shall be made by mailing true copies of the summons and the complaint to the defendant by first class mail and by any of the following: certified, registered, or express mail with return receipt requested. For purposes of this section, "first class mail" does not include certified,

registered, or <u>express mail</u>, return receipt requested, or any other form of mail which may delay or hinder actual delivery of mail to the addressee." (Emphasis added).

In the present case, Plaintiffs failed to properly serve Pite Duncan and Cal-Western and this motion to dismiss should be granted.

Insufficient Service on Pite Duncan:

First, the Affidavit of Service filed by Christopher D. Hall filed in support of Plaintiffs' Default Request ("Hall Affidavit"), attaches, in support, USPS mailing receipts for Cal-Western. See Hall Affidavit-Pite Duncan attached hereto as exhibit 1. The mailing receipt for Pite Duncan's purported address is attached to the Hall Affidavit for service on National City Mortgage. See Hall Affidavit-NCM attached hereto as exhibit 2. Furthermore, the Affidavit of Service for Cal-Western attaches a receipt stating service was made on Cal-Western at NCM's address in Ohio. See Hall Affidavit-Cal-Western, attached hereto as exhibit 3. Even assuming in a light most favorable to Plaintiffs that the Summons was sent to the correct address, service was insufficient for additional reasons. Personal service was not made by delivering a copy of the Summons. The only service that Plaintiffs attempted upon Defendant was by express mail. See Hall Affidavit-Pite Duncan, exhibit 1.

Oregon rules on service by mail are clear, service must be made by first class mail and by another source of mail, such as express mail. ORCP 7D(2)(d)(i). First class mail does not include express mail. <u>Id.</u> This fact alone, failure to properly mail, should be enough to grant Defendants' motion to dismiss. However, in addition, and more importantly, Plaintiffs' service was improper because it failed to list the correct address of the office of the limited partnership as shown on the records of the Secretary of State. Plaintiffs addressed the mail intended for Pite Duncan to PO BOX

17934. <u>See</u> Hall Affidavit-NCM, exhibit 2. The Oregon Secretary of State records lists Pite Duncan's principal place of business and mailing address as 4375 Jutland Dr. STE 200, San Diego, CA 92117. There is no mention of a PO Box number. <u>See</u> Declaration of David J. Boulanger filed concurrently herewith Therefore, Plaintiffs failed to mail the Summons to the correct address.

Insufficient Service on Cal-Western:

The same failures of service that were made in Pite Duncan's case were made in Cal-Western's case. First, there were substantial mix ups in the Affidavits of Service, as mentioned above. Second, no personal service was made. Third, improper service was attempted by express mail only. See Hall Affidavit-Cal-Western, exhibit 3. Fourth, the mail was sent to the wrong address per Oregon's Secretary of State's records. The SOS lists Cal-Western's registered agent at 325 13th St. NE, STE 501, Salem, OR 97301, not 525 E. Main St., PO Box 22004-9004, El Cajon, CA. That is not even an address listed on the SOS's site. See Declaration of Boulanger. Therefore, Plaintiffs clearly failed to mail the Summons to the correct address. Accordingly, it is evident from the many deficiencies that there was insufficient service of process on both Defendants and this motion to dismiss should be granted.

CONCLUSION

As can be seen, there were many defects in Plaintiffs' attempted service by mail. Plaintiffs' limited attempt to serve Defendants by express mail alone to incorrect addresses was not made in a manner reasonably calculated to apprize Defendants of the existence and pendency of the action ///

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and to afford a reasonable opportunity to appear and defend. Therefore, Defendant's motion to dismiss should be granted.

Dated: 2/23/11 PITE DUNCAN, LLP

<u>/s/ David J. Boulanger</u>

ROCHELLE L. STANFORD, OSB No. 06244

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Phone: 503-222-2256 Fax: 503-222-2260

Attorneys for Defendants Pite Duncan, LLP and Cal-Western Reconveyance Corporation

Case 3:10-cv-01286-BR Document 21 Filed 02/23/11 Page 6 of 23 Page ID#: 71

EXHIBIT 1

FILED 11 FEB 15 15/07USDC-ORP UNITED STATES DISTRICT COURT DISTRICT OF OREGON

SUMMONS

DOUGLAS E. HALL AND KENNETH D. HALL,

Plaintiffs.

Civil No. 3:10-cv-01286-BR

٧.

NATIONAL CITY MORTGAGE CO., dba COMMONWEALTH UNITED MORTGAGE CO.;

CAL-WESTERN RECONVEYANCE CORPORATION, as Trustee, a subsidiary of Prommis Solutions, LLC; and

PITE DUNCAN, LLP,

Defendants.

To Pite Duncan, LLP:

A lawsuit has been filed against you.

Withing 20 (twenty) days after service of this summons on you (not counting the day you receive it), you must serve the Plaintiffs an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the Plaintiffs at Douglas E. Hall, 12585 SW Bull Mountain Road, Tigard, OR 97224. If you fail to do so, judgment by default will be entered against you for the relief demanded in the complaint. You must also file your answer or motion with the court.

Date: JAN 1.9 2011

Mary L. Moran, Clerk of Court

Clerk of the Court

UNITED STATES DISTRICT COURT DISTRICT OF OREGON

DOUGLAS E. HALL AND KENNETH D. HALL,

Civil No. 3:10-cv-01286-BR

Plaintiffs,

AFFIDAVIT OF SERVICE - FRCP 4(1)

v.

NATIONAL CITY MORTGAGE CO., dba COMMONWEALTH UNITED MORTGAGE CO.; CAL-WESTERN RECONVEYANCE CORPORATION, as Trustee, a subsidiary of Prommis Solutions, LLC; and PITE DUNCAN, LLP,

Defendants.

STATE OF OREGON, County of Washing (70) } ss

I am over 18 years of age, a resident of Oregon state, not a party to nor an officer, director, or employee of, nor attorney for any party, corporate or otherwise. I did swear under penalty of perjury that on January 19, 2011, I did serve the Summons and a true copy of Plaintiffs' "COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF" on each of the Defendants by U.S. Express mail, pursuant to FRCP 4(e)(1) and ORCP 7 F(2)(a)(i), each addressed to each Defendant's principal place of business, as shown by the attached true copies of the USPS receipts.

Christopher D. Hall

12585 SW Bull Mountain Road

Tigard, OR 97224 503-684-0193

Sworn and subscribed before me on February /4th, 2011

OFFICIAL SEAL
MICHELLE J TIPTON
NOTARY PUBLIC - OREGON
COMMISSION NO. 433679
MY COMMISSION EXPIRES NOVEMBER 23, 2012

Notary Public for Oregon



Date: 01/23/2011

doug hall:

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Case 3:10-cv-01286-BR Case 3:10-cv-01286-BR Document 21
Document 10 Filed 02/23/11 Filed 02/15/17 Page 10 of 23 Page 12 f/5 Page Page ID#: 75 Page_ID#: 32 Page

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Product Sale Unit Description Qty Price	Final Price
SAN DIEGO CA 92177 Zone-5 Express Mail PO-Add Flat Rate Env 2.30 oz. Label #:EH812552643US Thu 01/20/11 12:00 PM - Guaranteed Delivery Signature Requested	\$18.30
Issue PVI:	\$18.30
DAYTON OH 45401 Zone-8 Express Mail PO-Add Flat Rate Env 2.40 oz. Label #:EH931864465US Fri 01/21/11 12:00 PM - Guaranteed Delivery Signature Requested	\$18.30
Issue PVI:	\$18.30
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Signature Requested

Issue PVI:

Total:

Case 3:10-cv-01286-BR Document 21 Filed 02/23/11 Page 12 of 23 Page ID#: 77

FILED'11 FEB 15 15:07USDC-ORP

UNITED STATES DISTRICT COURT DISTRICT OF OREGON

DOUGLAS E. HALL AND KENNETH D. HALL,

Plaintiffs,

Civil No. 3:10-cv-01286-BR

v.

NATIONAL CITY MORTGAGE CO., dba COMMONWEALTH UNITED MORTGAGE CO.;

CAL-WESTERN RECONVEYANCE CORPORATION, as Trustee, a subsidiary of Prommis Solutions, LLC; and

PITE DUNCAN, LLP,

Defendants.

SUMMONS

To National City Mortgage Co., doing business as Commonwealth United Mortgage Co.:

A lawsuit has been filed against you.

Withing 20 (twenty) days after service of this summons on you (not counting the day you receive it), you must serve the Plaintiffs an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the Plaintiffs at Douglas E. Hall, 12585 SW Bull Mountain Road, Tigard, OR 97224. If you fail to do so, judgment by default will be entered against you for the relief demanded in the complaint. You must also file your answer or motion with the court.

Date: ..JAN...1.9..2011......

Mary L. Moran, Clerk of Co.

Clerk of the Court

DEPUTY CLERK

UNITED STATES DISTRICT COURT DISTRICT OF OREGON

DOUGLAS E. HALL AND KENNETH D. HALL,

Civil No. 3:10-cv-01286-BR

Plaintiffs.

AFFIDAVIT OF SERVICE - FRCP 4(1)

v.

NATIONAL CITY MORTGAGE CO., dba COMMONWEALTH UNITED MORTGAGE CO.; CAL-WESTERN RECONVEYANCE CORPORATION, as Trustee, a subsidiary of Prommis Solutions, LLC; and PITE DUNCAN, LLP,

Defendants.

I am over 18 years of age, a resident of Oregon state, not a party to nor an officer, director, or employee of, nor attorney for any party, corporate or otherwise. I did swear under penalty of perjury that on January 19, 2011, I did serve the Summons and a true copy of Plaintiffs' "COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF" on each of the Defendants by U.S. Express mail, pursuant to FRCP 4(e)(1) and ORCP 7 F(2)(a)(i), each addressed to each Defendant's principal place of business, as shown by the attached true copies of the USPS receipts.

Christopher D. Hall

12585 SW Bull Mountain Road

Tigard, OR 97224

503-684-0193

Sworn and subscribed before me on February /4th, 2011



Notary Public for Oregon

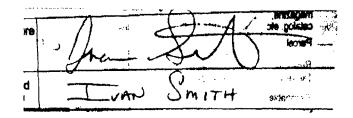


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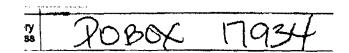
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Case 3:10-cv-01286-BR Document 21 Filed 02/23/11 Page 18 of 23 Page ID#: 83

FILEP 11 FEB 15 15 407 USIC-ORP UNITED STATES DISTRICT COURT DISTRICT OF OREGON

DOUGLAS E. HALL AND KENNETH D. HALL,

Civil No. 3:10-cv-01286-BR

Plaintiffs,

SUMMONS

NATIONAL CITY MORTGAGE CO., dba COMMONWEALTH UNITED

MORTGAGE CO.;

v.

CAL-WESTERN RECONVEYANCE CORPORATION, as Trustee, a subsidiary of Prommis Solutions, LLC; and

PITE DUNCAN, LLP,

Defendants.

To Cal-Western Reconveyance Corporation, as Trustee, a subsidiary of Prommis Solutions, LLC:

A lawsuit has been filed against you.

Withing 20 (twenty) days after service of this summons on you (not counting the day you receive it), you must serve the Plaintiffs an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the Plaintiffs at Douglas E. Hall, 12585 SW Bull Mountain Road, Tigard, OR 97224. If you fail to do so, judgment by default will be entered against you for the relief demanded in the complaint. You must also file your answer or motion with the court.

Date: JAN 1 9 2011

Mary L. Moran, Clerk of Court

Clerk of the Court

DEPUTY CLERK

UNITED STATES DISTRICT COURT DISTRICT OF OREGON

DOUGLAS E. HALL AND KENNETH D. HALL,

Civil No. 3:10-cy-01286-BR

Plaintiffs,

AFFIDAVIT OF SERVICE – FRCP 4(1)

v.

NATIONAL CITY MORTGAGE CO., dba COMMONWEALTH UNITED MORTGAGE CO.; CAL-WESTERN RECONVEYANCE CORPORATION, as Trustee, a subsidiary of Prommis Solutions, LLC; and PITE DUNCAN, LLP,

Defendants.

STATE OF OREGON, County of Wally ATM

I am over 18 years of age, a resident of Oregon state, not a party to nor an officer, director, or employee of, nor attorney for any party, corporate or otherwise. I did swear under penalty of perjury that on January 19, 2011, I did serve the Summons and a true copy of Plaintiffs' "COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF" on each of the Defendants by U.S. Express mail, pursuant to FRCP 4(e)(1) and ORCP 7 F(2)(a)(i), each addressed to each Defendant's principal place of business, as shown by the attached true copies of the USPS receipts.

Christopher D. Hall

12585 SW Bull Mountain Road

Tigard, OR 97224

503-684-0193

Sworn and subscribed before me on February /4th, 2011

OFFICIAL SEAL MICHELLE J TIPTON NOTAR PUBLIC - OREGON COMMISSION NO. 433679 NY COMMISSION EXPIRES NOVEMBER 23, 2012

Notary Public for Oregon

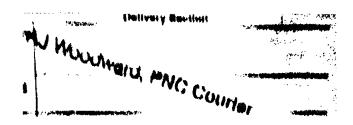


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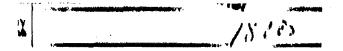
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Issue PVI: \$18.30

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Label #:EH931864536US Thu 01/20/11 12:00 PM -Guaranteed Delivery Signature Requested

Issue PVI: \$18.30

Total: \$54.90